

PEABODY COAL CO.

IBLA 79-295

Decided March 23, 1981

Appeal from the decision of the Acting Deputy Commissioner, Bureau of Indian Affairs, which affirmed an order of the District Mining Supervisor, Geological Survey, requiring appellant to include in the royalty base the 35-cent reclamation fee imposed under the Surface Mining Control and Reclamation Act of 1977. IND-11-MIN.

Affirmed.

1. Coal Leases and Permits: Royalties -- Indian Lands: Leases and Permits: Minerals -- Indian Lands: Mining Leases: Generally

Where coal leases for Indian lands state that the applicable royalty rate is to be based on gross realization, which is further defined as the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense, this royalty base includes the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act where the selling price is increased by that amount or where the seller is reimbursed for that amount by the buyer.

2. Administrative Procedure: Rulemaking -- Coal Leases and Permits: Royalties -- Indian Lands: Leases and Permits: Minerals -- Indian Lands: Mining Leases: Generally

The rulemaking procedures in 5 U.S.C. § 553 (1976) do not apply to administrative interpretations which conclude that the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act is to be included as part of the royalty base under Indian coal leases.

APPEARANCES: Gregory J. Leisse, Esq., St. Louis, Missouri, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Peabody Coal Company (Peabody) has appealed from the February 13, 1979, decision of the Acting Deputy Commissioner, Indian Affairs, which affirmed an order of the District Mining Supervisor, Geological Survey (GS). That order required appellant to include the 35-cent per ton reclamation fee imposed under the Surface Mining Control and Reclamation Act of 1977 in its royalty base for payment to the Secretary of the Interior for the benefit of the Indian tribe involved. ^{1/} Peabody's first argument is that GS failed to comply with the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), as well as standards of fundamental fairness and due process, in issuing the decision under review. Secondly, Peabody argues that reimbursements received for the reclamation fee should not be included in computation of gross realization under the subject contract. We will consider the second contention first.

The decisions below cited this Board's opinion in Knife River Coal Mining Co., 29 IBLA 26 (1977), wherein we held that under a Federal coal lease, a state's severance tax must be included in the royalty base when the lessee is reimbursed for such tax by its customer. In a more recent decision involving the same appellant, we held that the reclamation fee imposed by the Surface Mining Control and Reclamation Act must similarly be considered as part of the gross value of production under a Federal coal lease where the selling price received at the point of shipment to market is increased by that amount. Knife River Coal Mining Co., 43 IBLA 104, 86 I.D. 472 (1979). In those cases, the value for the purpose of royalty computation was considered to be the gross price. See 30 CFR 211.63(b). Similarly, the leases at issue here specify that the royalty is to be a stated percentage of "gross realization" which is defined as "the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense." (Emphasis supplied.)

Peabody contends, however, that this provision should not be construed to include the reclamation fee. Peabody states:

Since in common usage the terms "overhead" and "sales costs" are mutually exclusive and refer to categories of expenses which accountants customarily show in separate portions of an income statement, it is clear there is a

^{1/} The Navajo Tribe of Indians is the lessor for leases 14-20-0603-8580 and 14-20-0603-9910. The Hopi Tribe of Indians is the lessor for lease 14-20-0450-5743.

comma missing in the text of the lease. If the comma is supplied, the lease provides that no deduction is permitted for "overhead" (frequently now called "general and administrative expense"), for "selling costs" (usually so referred to today) or for any "other business expense," meaning expenses of the same kind or character as "overhead" and "selling costs." That the reclamation fee is not of such a character is clear. It is an exaction by government.

(Statement of Reasons, pp. 9-10).

Appellant's argument would require us to construe the lease to exclude from the royalty base all business expenses of a different nature than overhead and sales costs. Such a construction is demonstrably incorrect. The fact that a cost is of a different character than selling costs or overhead does not automatically mean that it should be deductible from the royalty base. Otherwise, one could equally argue that the costs of mining are also of a different character than selling costs or overhead. Indeed, the costs of mining can be more clearly distinguished from selling costs or overhead than can the reclamation fee. Nevertheless, to hold such costs to be deductible would, at least, require the deletion of the word "gross" from the terms of the lease.

Peabody urges us to disregard an "abstract" definition of "gross realization" that may be interpreted to mean that gross realization includes reimbursement for the reclamation fee. Like the appellant in Knife River Coal Mining Co., 43 IBLA 104, 86 I.D. 472 (1979), Peabody argues that the fee adds nothing to the value of the coal so that the addition of the fee to the basis for computing the royalty results in a windfall to the lessor. Peabody further contends that since the reclamation fee was imposed under a statute enacted in 1977 and did not exist when its coal leases were executed in 1966, the parties to the lease did not contemplate that such a fee would be included in the value basis for computing the royalty. It seems somewhat anomalous for Peabody to contend on one hand that the imposition of this fee was not contemplated when it entered the lease, while on the other hand it collects reimbursements for this fee under contracts which it made 10 years before imposition of the fee. These arguments were specifically rejected in Knife River Coal Mining Co., 43 IBLA 104, 86 I.D. 472 (1979).

Peabody has characterized this issue as whether the reclamation fee should be included in the gross realization for purposes of computing royalty. However, the issue is more properly characterized as whether the reclamation fee should be subtracted from the gross realization. If appellant continues to sell coal at the previous price after imposition of the reclamation fee, there should be no

increase in royalty paid to the lessor. But if appellant passes the reclamation fee to its customers, either through an increase in the selling price or by direct rebate of the reclamation fee, the lessor is properly compensated for the increased value received. Thus, it becomes clear that this result is not contrary to the intent of the lease. Rather, it is fully consistent with the intent of the parties, and the decision from which Peabody has appealed does not change that relationship.

Peabody points out that its buyers reimburse it for the fee paid under a different provision of its contract from the provisions which define the mine price. It contends that this manifests an intent to treat such fees as separate from the components that determine the price. We find this argument unconvincing. We do not find it necessary to determine the lessor's intent as to whether an item is included as gross realization solely on the basis of the particular clause in appellant's contract with its customers that calls for reimbursement of these costs. In United States v. Southwest Potash Corp., 352 F.2d 113 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966), the court rejected the lessee's contention that the royalty base should be the price specified in contracts for sale of raw ore. The court upheld this Department's determination that the proper royalty base was the price that would have been received had the ore been processed to a product saleable in the normal market. Thus, the indication of the price in a lessee's contract with its customers does not always determine the gross sales price for purposes of royalty computation under a lease. Furthermore, we believe it would appear arbitrary to construe similar provisions in Federal or Indian mineral leases in a different way for different lessees on the pretext of a difference in the subjective intent of the lessee, where the evidence of that intent is based not on the conduct of both parties to the lease but solely on the conduct of the lessee with respect to its customers.

[1] Accordingly, we hold that the reimbursement appellant receives from its customers for the reclamation fee is properly included in the royalty base, notwithstanding the fact that it is collected under a different provision of its contract with its customers than the paragraph which defines mine price. The controlling fact is that reimbursement for the reclamation fee adds to the amount the customers must pay. 2/ Inclusion of the fee in the royalty base is warranted because the economic effect of increasing the selling price by the amount of

2/ In a case involving oil and gas leases for Federal and Indian lands, we held that the amount of severance tax is properly included in the royalty, even where the lessee's customer pays the tax directly to the state and deducts that tax from the amount paid to the lessee. Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981).

fee is no different from the effect of the increase attributable to a tax or other cost of operation. Knife River Coal Mining Co., 43 IBLA 104, 86 I.D. 472 (1979). The economic reasons sustaining this result are stated more fully in that opinion. Id. at n.2.

[2] Appellant's argument that the agency is required to comply with the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553 (1976), in making this decision is somewhat unclear. In effect, appellant appears to be arguing that every time the agency determines the rights and liabilities of the parties to a mineral lease under the existing provisions of that lease, it must engage in rulemaking to provide an opportunity for participation by all other lessees similarly situated, as well as by the lessee's customers. Such an argument can only be based on a definition of rulemaking that would cover routine adjudication as well. We fail to see how the Administrative Procedure Act can support such an extended definition of the scope of rulemaking. Indeed, the Act provides that an agency may rely on its prior decisions as precedent for subsequent adjudications if they have been indexed and published as the decisions of this Board are. 5 U.S.C. § 552(a)(2) (1976).

In support of its contention that rulemaking is required, appellant cites a decision by the Acting Director, GS, in Texaco, Inc., GS-119-O&G (Jan. 15, 1979). The determination that rulemaking should be followed in that case, however, was based on the specific finding that the notices to lessees under appeal "substantially changed previous interpretations of the royalty regulations followed for the past 25 years and consequently altered the method of royalty computation by changing the method of determining value." This is in marked contrast to the instant appeal in which we have held that it is consistent with existing lease provisions to include in the royalty base the amount appellant receives in compensation for the reclamation fee. Although the reclamation fee may be new, the interpretation that the reimbursement appellant receives for paying the fee should be included in the gross realization is not based on any specialized or novel interpretation of the terms of appellant's lease. Appellant has failed to demonstrate that this is a situation in which rulemaking is required. See generally Harry A. Zuckerman, 41 IBLA 372 (1979).

Furthermore, appellant has not demonstrated how it has been deprived of due process or fundamental fairness. Appellant has had a full opportunity to submit legal arguments in its statement of reasons on its appeal. Appellant suggests that an evidentiary hearing may be appropriate but makes no specific request for one. In any event, no hearing is required in the absence of an issue of material fact, and appellant has made no offer of proof of a fact which would mandate a decision in its favor. See Foote Mineral Co., 34 IBLA 285, 85 I.D. 171 (1978); Rodney Rolfe, 25 IBLA 331, 83 I.D. 269 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge

